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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 267. 30

THE GREENWICH INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 28, 1883.

SUPREME COURT OF THE UNITED STATES.

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vs.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The Providence and Stonington Steamship Company, plaintiff, and The Greenwich Insurance Company, defendant, a manifest error hath happened, to the great damage of the said The Greenwich Insurance Company, defendant, as is said, and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you,

2 if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States and the justices thereof, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said city of Washington before the said Supreme Court and the justices thereof on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventh day of Au-

3 gust, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is allowed, dated August 1st, 1883.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA, *Southern District of New York:*

3½ I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from five to eighty-five, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Greenwich Insurance Company, plaintiff in error, against The Providence and Stonington Steamship Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty-three,

and of the Independence of the United States the one hundred and eighth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

4 [Endorsed:] U. S. circuit court, southern dist. of New York. Providence and Stonington Steamship Company *ag'st* the Greenwich Insurance Co. (Original.) Writ of error. Butler, Stillman & Hubbard, defendant's attorney. 111 Broadway, N. Y. [Stamped.]

5 *Summons.*

Supreme Court.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated June 15th, 1881.

WILLIAM P. DIXON,
Plaintiff's Attorney, Office No. 50 Wall Street, New York City.

6 [Endorsed:] Supreme court. City and county of N. Y. The Providence and Stonington Steamship Co., *vs.* The Greenwich Insurance Company. Summons. To the defendant. Wm. P. Dixon, pl'ffs att'y, 50 Wall st., N. Y.

7 *Complaint.*

Supreme Court.

CITY AND COUNTY OF NEW YORK:

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

The plaintiff above named, by William P. Dixon, its attorney, for complaint against the defendant, respectfully shows to the court:

First. That at the times hereinafter mentioned the plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Rhode Island, and was at such times owner of the steamer "Rhode Island."

Second. That at the times hereinafter mentioned the defendant was and it now is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Third. That heretofore, and on the 5th day of April, 1880, said defendant in its said name, The Greenwich Insurance Company, made and delivered unto said plaintiff, The Providence and Stonington Steamship Company of the City of New York, its certain policy of Insurance, numbered 2661, whereby, in consideration of the sum of two hundred dollars to said defendant, paid by said plaintiff, the said defendant did insure said plaintiff in the
8 sum of ten thousand dollars for the term of six months from the fifth day of April, 1880, at noon, to the fifth day of October, 1880, at noon, for all and any damage to the plaintiff's said steamer "Rhode Island," her engines, boilers, machinery, &c., that might arise from the perils of the sea, and for all damages caused by stranding, sinking, or collison, and the plaintiff hereby refers to the said policy for the particulars thereof, and makes the same a part of this complaint.

Fourth. That at the time of issuance of the policy of insurance aforesaid it was understood and agreed by and between the plaintiff and the defendant, by agreement endorsed upon the said policy of insurance, that the said policy of insurance was to continue in force from the date of expiration thereof until notice should be given the defendant of the discontinuance thereof; this plaintiff, as the assured, was to pay for such privilege a *pro rata* rate of premium for the time used, which premium this plaintiff is ready and willing to pay.

Fifth. That on the night of the sixth day of November, 1880, said policy and privilege being still in force, no notice of the discontinuance thereof having been given by the plaintiff to the defendant, as provided for in the agreement hereinbefore referred to, the said steamer "Rhode Island" while proceeding from New York to Providence on her regular trip, and when opposite Beaver Tail lighthouse, off the Rhode Island Island shore, ran unto and struck on the rocks at Bonnet Point, and thereby stranded, and by reason of the force and fury of the wind and sea was wrecked, and the plaintiff thereby sustained and suffered damages in excess of fifty-seven thousand five hundred dollars, the total amount of insurance upon said steamer.

9 Sixth. That the plaintiff has duly fulfilled all of the conditions of said insurance upon its part, and more than sixty days before the commencement of this action, and on or about the 29th day of January, 1881, said plaintiff gave to this defendant due notice and proofs of the loss aforesaid, and that after the expiration of thirty days from the time of giving such notice and proofs of loss aforesaid, and before the commencement of this action, said plaintiff duly demanded from said defendant payment of said ten thousand dollars, the amount of such insurance, which was refused, and that said defendant has not paid said sum, or any part thereof, and that the same now remains wholly due and unpaid.

Wherefore the plaintiff prays judgment against the defendant for

the sum of ten thousand dollars, with interest since the 28th day of February, 1881, besides the costs and disbursements of this action.

WILLIAM P. DIXON,
Plaintiff's Attorney.

Office and post-office address: No. 50 Wall street, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

David S. Babcock, being duly sworn, says: That he is president of The Providence and Stonington Steamship Company, the plaintiff named in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

D. S. BABCOCK.

Sworn to before me, this 11th day of July, 1881.

JAMES C. GERARD,
Notary Public.

10 [Endorsed:] Supreme Court. The Providence and Stonington Steamship Company against The Greenwich Insurance Company. Complaint. ("Rhode Island.") William P. Dixon, plaintiff's attorney, 50 Wall street, New York city. To Messrs. Butler, Stillman & Hubbard, att'ys for def't.

11 Supreme Court, City and County of New York.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

The defendant above named, by Butler, Stillman and Hubbard, its attorneys, answers the complaint of the plaintiff in the above-entitled action as follows:

First. The defendant admits that it made and delivered to the plaintiff on the 5th day of April, 1880, its policy of insurance, numbered 2,661, on the steamer Rhode Island, but avers that the terms and conditions of the said policy of insurance are not truly and fully set forth in the complaint, and for greater certainty demands that the original policy of insurance be produced on the trial.

Second. The defendant admits that at the time of the issu-
12 ance of the said policy of insurance an agreement was made by and between the plaintiff and defendant, and written upon the face of the said policy of insurance; that the said policy of insurance was to continue in force from the date of expiration until notice should be given to the defendant of its discontinuance, the assured to pay for such privilege *pro rata* for the time used, and that on the 6th day of November, 1880, the said steamer Rhode Island, while proceeding from New York to Providence, struck on the rocks at Bonnet Point, and subsequently became lost, and upon in-

formation and belief the defendant denies each and every other allegation in the said complaint contained.

Third. Further answering the said complaint, the defendant avers that the said policy of insurance was for the term of six months, to wit, from the 5th day of April, 1880, at noon, until the 5th day of October, 1880, at noon; that on the 4th day of October, 1880, the defendant duly notified the plaintiff that the defendant would
13 not renew or continue the said policy beyond the said 5th day of October, 1880.

Fourth. Further answering the said complaint, the defendant avers that subsequent to such notice, and on or about the 9th day of October, 1880, the plaintiff agreed that the said policy of insurance should be discontinued and expire on the 5th day of November, 1880, at noon.

Fifth. Further answering the said complaint, the defendant avers that no proof- of loss under the said policy of insurance have ever been made by the plaintiff to the defendant, and that by the terms and conditions of said policy of insurance it was provided that in case of loss under the said policy of insurance payment should be made only within thirty days after proof of same.

Sixth. Further answering the said complaint, the defendant avers that no demand was ever made on it by the plaintiff for the payment of any loss on said policy — to the bringing of this action.

14 Wherefore the defendant demands judgment that the said complaint of the plaintiff be dismissed, with costs.

BUTLER, STILLMAN & HUBBARD,
Defendant's Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

Mason A. Stone, being duly sworn, deposes and says: That he is the secretary of The Greenwich Insurance Company, defendant above named; that he has read the foregoing answer and knows the contents thereof, and the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

——— ———.

Sworn to before me, this 13 day of September, 1880.

WILLIAM T. GILBERT,
Notary Public, Kings Co.

Cert. in N. Y. Co.

15 (Endorsed:) New York supreme court. The Providence and Stonington Steamship Company, plaintiff, *vs.* The Greenwich Insurance Company, defendant. Answer. Butler, Stillman & Hubbard, defendant's attorneys, 111 Broadway, New York.

16 At a special term of the supreme court of the State of New York in and for the city and county of New York, held at the court-house in the city of New York on the 22nd day of November, 1881.

Present: Hon. Charles Donohue, justice.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

On reading and filing the annexed petition of The Greenwich Insurance Company, verified the 14th day of November, 1881, praying for the removal of this suit into the circuit court of the United States for the southern district of New York, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon filing the bond, with good and sufficient surety, offered by said defendant, according to the requirements of said laws, on motion of Butler, Stillman & Hubbard,
17 attorneys for the defendant, it is ordered that said bond, with good and sufficient surety, and said petition be accepted, and that said suit be removed into the circuit court of the United States for the southern district of New York in the second circuit, and that no further proceeding be had in this court.

Witness the honorable —— ——, one of the justices of said supreme court, and the seal thereof, the — day of ——, 1881.

A copy.

[County Clerk's Seal.]

WILLIAM A. BUTLER, *Clerk.*

Please take notice that the within is a copy of an order made herein and entered and filed in the office of the clerk of this court on the 22 day of November, 1881.

N. Y., December 21, 1881.

BUTLER, STILLMAN & HUBBARD,
Def't's Att'ys.

To Wm. P. Dixon, pl'ff's att'y.

18 *Petition.*

Supreme Court of the State of New York.

THE PROVIDENCE & STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY.

To the supreme court of the State of New York:

The petition of The Greenwich Insurance Company respectfully shows that your petitioner is the defendant in this suit, and that the same was brought by The Providence and Stonington Steamship Company on or about the 16th day of June, 1881, in a State court, to wit, the supreme court of the State of New York for the city and county of New York, and that at the time of bringing this suit your petitioner was and now is a citizen of the State of New York, and that the plaintiff was not at the time of bringing this suit a citizen of the State of New York, but was and now is a citizen of the State of Rhode Island; and your petitioner further respectfully shows that at the time when this suit was brought there was and now is a controversy therein between citizens of different States, to wit, the

said plaintiff being a foreign corporation organized and existing under and by virtue of the laws of the State of Rhode Island
19 and the said defendant being a corporation organized and existing under and by virtue of the laws of the State of New York; and further, that the said plaintiff claims in the summons and complaint in this suit as damages against your petitioner the sum of ten thousand dollars, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

That this suit has not been tried but is at issue and now pending for trial in the city and county of New York at this November term, 1881, and that the said term is the term of this court at which said cause could be first tried.

That your petitioner desires to remove this suit before trial thereof into the next circuit court of the United States for the southern district of New York, being the district where said suit is pending, in the second circuit, in pursuance of the Revised Statutes of the United States and of the act of Congress entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes," approved March 3, 1875, and that your petitioner is ready and willing to make and file herewith a bond, with good and sufficient surety, for its entering in such circuit court on the first day of its next session a copy of the record in such suit and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto and for doing all other acts and things required to be done
20 by the Revised Statutes of the United States, and by the said act of Congress in such case made and provided, and it offers herewith its bond, executed by Mason A. Stone, of New York city, as surety, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter in such circuit court on the first day of its next session a copy of the record in such suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that said cause was wrongfully or improperly removed thereto, and for doing such other appropriate acts as by the Revised Statutes of the United States and by the said act of Congress are required to be done; and your petitioner therefore prays that the said bond be accepted as good and sufficient surety according to said provisions of law, and that said suit may be removed into the next circuit court of the United States, to be held in the southern district of New York, in the second circuit, pursuant to the statute made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

Dated November 14, 1881.

THE GREENWICH INSURANCE CO.
By M. A. STONE, *Secretary.*

BUTLER, STILLMAN & HUBBARD,
Attorneys for Petitioner.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Mason A. Stone being duly sworn, deposes and says: That
21 he is the secretary of The Greenwich Insurance Company, petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

M. A. STONE.

Subscribed & sworn to before me this 14th day of November, 1881.

WILLIAM T. GILBERT,
Notary Public, Kings Co.

Cert. in N. Y. Co.

22 *Bond.*

Supreme Court of the State of New York.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

We, The Greenwich Insurance Company, as principal, and Mason A. Stone, of New York city, as surety, are held and firmly bound unto the plaintiff, The Providence and Stonington Steamship Company, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The Providence and Stonington Steamship Company, or to its successors or assigns; for which payment, well and truly to be made, we hereby bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the 14th day of November, 1881.

Whereas a suit was brought on or about the 16th day of June, one thousand eight hundred and eighty-one, in the supreme court of the State of New York in and for the city and county of New York, by the said Providence and Stonington Steamship Company against the said Greenwich Insurance Company, and the same is now pending for trial in said supreme court of the State
23 of New York, and is removable into the circuit court of the United States for the southern district of New York, in the second circuit, under the Revised Statutes of the United States and under the act of Congress entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March 3d, 1875; and

Whereas the said The Greenwich Insurance Company has filed its petition in the said supreme court for the removal of said suit into the next circuit court of the United States to be held in the southern

district of New York, in the second circuit, pursuant to the said statute of the United States in such made and provided:

Now, therefore, the condition of this obligation is such that if the above bounden The Greenwich Insurance Company, its successor or successors, shall enter, or cause to be entered, in the circuit court of the United States for the southern district of New York, on the first day of its next session, a copy of the record in such suit, and shall pay all costs that may be awarded by the said circuit court if the said court shall hold that such suit was wrongfully or improperly removed thereto, or cause to be done such other appropriate acts as by the Revised Statutes of the United States and the said act of Congress are required to be done upon the removal of a suit into the United States circuit court, then the above obligation to be void; otherwise to remain in full force and virtue.

THE GREENWICH INSURANCE CO.,
[L. S.] By M. A. STONE, *Secretary.*
M. A. STONE. [L. S.]

24 STATE OF NEW YORK, } ss:
City and County of New York, }

On this 14th day of November, 1881, before me came Mason A. Stone, with whom I am personally acquainted, who being by me duly sworn, says: That he resides at No. 23 East 66th St., in the city of New York; that he is secretary of The Greenwich Insurance Company, the corporation described in and which has executed the foregoing bond; that he knows the corporate seal thereof; that the seal affixed to said bond is the corporate seal of the said The Greenwich Insurance Company, and was affixed thereto by its authority, and by like authority he subscribed his name thereto.

WILLIAM T. GILBERT,
Notary Public, Kings Co.

Cert. in N. Y. Co.

STATE OF NEW YORK, } ss:
City and County of New York, }

Mason A. Stone, being duly sworn, says: That he is the surety named in the foregoing obligation; that he is a resident of the State of New York and a freeholder therein, and is worth the sum of $1,000.00 over all his just debts and liabilities and exclusive of property exempt by law from execution.

M. A. STONE.

Sworn and subscribed to before me, this 14 day of November, 1881.

WILLIAM T. GILBERT,
Notary Public, Kings Co.

Cert. in N. Y. Co.

25 STATE OF NEW YORK, } ss:
City and County of New York, }

I certify that on this 14th day of November, 1881, before me personally appeared Mason A. Stone, to me known, and known to me

to be the same person described in and who executed the foregoing bond, and acknowledged to me that he executed the same.

WILLIAM T. GILBERT,
Notary Public, Kings Co.

Cert. in N. Y. Co.

Foregoing bond is hereby approved as to form and sufficiency of sureties.

Dated N. Y., November 22d, 1881.

C. DONOHUE, *J.*

26 STATE OF NEW YORK, } *ss:*
City and County of New York, }

I, William A. Butler, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original summons, complaint, answer, petition, bond, & order of removal, composing the record in the action entitled "The Providence & Stonington Steamship Co. ag'st The Greenwich Insurance Co," on file in my office, and that the same are correct transcripts therefrom and the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed my office seal, this 25 day of Nov., 1881.

[County Clerk's Seal.]

WILLIAM A. BUTLER, *Clerk.*

27 [Endorsed:] New York supreme court. The Providence and Stonington Steamship Company, plaintiff, against The Greenwich Insurance Company. Petition, bond, and order removing cause to the United [States] circuit court. "Rhode Island." Butler, Stillman & Hubbard, defendant's attorneys, 111 Broadway, New York. U. S. circuit court. Filed Apr. 3, 1882. Joseph M. Deuel, clerk. Due service of a copy of the within order of removal and notice of entering and filing; the same is hereby admitted this 1 day of December, 1881. Wm. P. Dixon, att'y for pl'ff.

27½ Circuit Court of the United States for the Southern District of New York.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY
ag'st
THE GREENWICH INSURANCE COMPANY.

This cause having been originally commenced in the supreme court of the State of New York in and for the city and county of New York, and having been duly removed into this court on application of the defendant, and copies of the record in said cause in said New York supreme court duly certified having been this day duly filed in this court, and said defendant having appeared herein, by its atttorneys, Butler, Stillman & Hubbard, now, on motion of Butler, Stillman & Hubbard, it is ordered that said cause do proceed in this court as if it had originally been brought herein, and that

the appearance of said defendant, by Butler, Stillman & Hubbard, its attorneys, be, and the same is hereby, entered.

New York, April 3d, 1882.

28 Circuit Court of the United States for the Southern District of New York.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

Please take notice that we are retained by and appear for the defendant above named in the above-entitled action, and you will accordingly enter our appearence for the said defendant.

N. Y., April 3, 1882.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant.

To Joseph M. Deuel, clerk of the circuit court of the United States for the southern district of New York.

29 (Endorsed:) U. S. circuit court, southern district of New York. The Providence and Stonington Steamship Company against The Greenwich Insurance Company. Notice of appearance. Butler, Stillman & Hubbard, attorneys for defendant, 111 Broadway, New York city. U. S. circuit court. Filed Apr. 3d, 1882. Joseph M. Deuel, clerk.

30 United States Circuit Court, Southern District of New York.

PROVIDENCE AND STONINGTON STEAMSHIP COMPANY
against
THE GREENWICH INSURANCE COMPANY.

"Rhode Island."

Consent is hereby given that Miller, Peckham and Dixon be substituted in my place and stead as attorneys for the complainants in the above-entitled action.

WM. P. DIXON,
Complainant's Attorney.

MILLER, PECKHAM AND DIXON.

At a stated term of the circuit court of the United States, southern district of New York, held at the court-rooms, in the city of New York, on the — day of January, 1882.

Present: Hon. —— ——, circuit judge.

On reading and filing the foregoing consent, ordered that Miller, Peckham and Dixon be, and they are hereby, substituted
31 in place of William P. Dixon as attorneys for complainants in the above-entitled action.

SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court. The Providence and Stonington

Steamship Company against Greenwich Insurance Company. Stipulation and order of substitution. Miller, Peckham & Dixon, attorneys for plaintiff, No. 29 Wall street, N. Y. city. U. S. circuit court. Filed Jan. 24, 1882. Joseph M. Deuel, clerk.

32 *Summons.*

Supreme Court, City and County of New York

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated June 18th, 1881.

WILLIAM P. DIXON,
Plaintiff's Attorney.

Office address: No. 50 Wall street, New York city.

33 [Endorsed:] Supreme court, city and county of New York. The Providence and Stonington Steamship Co. *vs.* The Greenwich Ins. Co. Summons. Wm. P. Dixon, plaintiff's attorney, 50 Wall street, N. Y.

34 *Notice of Appearance.*

New York Supreme Court.

THE PROVIDENCE & STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

SIR: Please to take notice that the defendant appears in this action, and that we are retained as attorneys for it therein, and demand that a copy of the complaint and all papers in this action be served upon us at our offices, No. 111 Broadway, Trinity Building, New York city.

New York, July 2, 1881.

Yours, &c., BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant.

To William P. Dixon, Esq., plaintiff's attorney.

35 (Endorsed:) New York supreme court. The Providence and Stonington Steamship Company against The Greenwich Insurance Company. Notice of appearance of defendant. Butler, Stillman & Hubbard, attorneys for defendant. To Wm. P. Dixon, plaintiff's attorney. Received Jul. 5, 1881. Wm. P. Dixon.

36 *Complaint.*

Supreme Court, City and County of New York.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

The plaintiff above named, by William P. Dixon, its attorney, for complaint against the defendant, respectfully shows to the court:

First. That at the times hereinafter mentioned the plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Rhode Island, and was at such times owner of the steamer "Rhode Island."

Second. That at the times hereinafter mentioned the defendant was and it now is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Third. That heretofore and on the 5th day of April, 1880, said defendant, in its said name, The Greenwich Insurance Company, made and delivered unto said plaintiff, The Providence and Stonington Steamship Company, of the city of New York, its certain policy of insurance numbered 2661, whereby, in consideration of the sum of two hundred dollars to said defendant paid by said plaintiff, the said defendant did insure said plaintiff in the sum
37 of ten thousand dollars for the term of six months from the fifth day of April, 1880, at noon, to the fifth day of October, 1880, at noon, for all and any damage to the plaintiff's said steamer "Rhode Island," her engines, boilers, machinery, &c., that might arise from perils of the sea, and for all damages caused by stranding, sinking, or collision, and the plaintiff hereby refers to the said policy for the particulars thereof, and makes the same a part of this complaint.

Fourth. That at the time of issuance of the policy of insurance aforesaid it was understood and agreed by and between the plaintiff and the defendant, by agreement endorsed upon the said policy of insurance, that the said policy of insurance was to continue in force from the date of expiration thereof until notice should be given the defendant of the discontinuance thereof; this plaintiff, as the assured, was to pay for such privilege a *pro rata* rate of premium for the time used, which premium this plaintiff is ready and willing to pay.

Fifth. That on the night of the sixth day of November, 1880, said policy and privilege being still in force, no notice of the discontinuance thereof having been given by the plaintiff to the defendant, as provided for in the agreement hereinbefore referred to, the said steamer "Rhode Island," while proceeding from New York to Providence on her regular trip, and when opposite Beaver Tail lighthouse, off the Rhode Island shore, ran unto and struck on the rocks at Bonnet Point, and thereby stranded, and by reason of the force and fury of the wind and sea was wrecked, and the plaintiff thereby sustained and suffered damages in excess of fifty-seven

thousand five hundred dollars, the total amount of insurance upon said steamer.

38 Sixth. That the plaintiff has duly fulfilled all of the conditions of said insurance upon its part, and more than sixty days before the commencement of this action, and on or about the 29th day of January, 1881, said plaintiff gave to this defendant due notice and proofs of the loss aforesaid, and that after the expiration of thirty days from the time of giving such notice and proofs of loss aforesaid, and before the commencement of this action, said plaintiff duly demanded from said defendant payment of said ten thousand dollars, the amount of such insurance, which was refused, and that said defendant has not paid said sum, or any part thereof, and that the same now remains wholly due and unpaid.

Wherefore the plaintiff prays judgment against the defendant for the sum of ten thousand dollars, with interest since the 28th day of February, 1881, besides the costs and disbursements of this action.

WILLIAM P. DIXON,
Plaintiff's Attorney,

Office and post-office address, No. 50 Wall street, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

David S. Babcock, being duly sworn, says: That he is president of The Providence and Stonington Steamship Company, the plaintiff named in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

D. S. BABCOCK, *Pres't.*

Sworn to before me this 11th day of July, 1881.

JAMES C. GERARD,
Notary Public.

39 [Endorsed:] Supreme court. The Providence and Stonington Steamship Company against The Greenwich Insurance Company. Complaint. ("Rhode Island.") William P. Dixon, plaintiff's attorney, 50 Wall street, New York city. Due and timely service of a copy of the within complaint is hereby admitted this 12th July, 1881. Butler, Stillman & Hubbard, def't's att'ys.

40 CITY AND COUNTY OF NEW YORK, *ss:*

Supreme Court.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

The defendant above named, by Butler, Stillman and Hubbard, its attorneys, answers the complaint of the plaintiff in the above-entitled action, as follows:

First. The defendant admits that it made and delivered to the

plaintiff on the 5th day of April, 1880, its policy of insurance, numbered 2661, on the steamer Rhode Island, but avers that the terms and conditions of the said policy of insurance are not truly and fully set forth in the complaint, and for greater certainty demands that the original policy of insurance be produced on the trial.

Second. The defendant admits that at the time of the issuance of the said policy of insurance and agreement was made by and
41 between the plaintiff and defendant, and written upon the face of the said policy of insurance that the said policy of insurance was to continue in force from the date of expiration until notice should be given to the defendant of its discontinuance, the assured to pay for such privilege *pro rata* for the time used, and that on the 6th day of November, 1880, the said steamer Rhode Island, while proceeding from New York to Providence struck on the rocks at Bonnet Point, and subsequently became lost; and upon information and belief the defendant denies each and every other allegation in the said complaint contained.

Third. Further answering the said complaint, the defenant avers that the said policy of insurance was for the term of six months, to wit, from the 5th day of April, 1880, at noon, until the 5th day October, 1880, at noon; that on the 4th day of October, 1880, the defendant duly notified the plaintiff that the defendant would not renew or continue the said policy beyond the said 5th day of October, 1880.

Fourth. Further answering the said complaint, the defend-
42 ant avers that subsequent to such notice, and on or about the 9th day of October, 1880, the plaintiff agreed that the said policy of insurance should be discontinued and expire on the 5th day of November, 1880, at noon.

Fifth. Further answering the said complaint, the defendant avers that no proofs of loss under the said policy of insurance have ever been made by the plaintiff to the defendant, and that by the terms and conditions of said policy of insurance it was provided that in case of loss under the said policy of insurance payment should be made only within thirty days after proof of same.

Sixth. Further answering the said complaint, the defendant avers that no demand was ever made on it by the plaintiff for the payment of any loss on said policy prior to the bringing of this action.

Wherefore the defendant demands judgment that the said complaint of the plaintiff be dismissed, with costs.

BUTLER, STILLMAN & HUBBARD,
Att'ys for Def't.

43 CITY AND COUNTY OF NEW YORK, *ss:*

Mason A. Stone, being duly sworn, deposes and says: That he is secretary of The Greenwich Insurance Company, defendant above named; that he has read the foregoing answer, and knows the contents thereof, and the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

M. A. STONE.

Sworn to before me this 13 day of September, 1881.
WM. T. GILBERT,
Notary Public, Kings Co.

Cert. in N. Y. Co.

(Endorsed:) New York supreme court. The Providence and Stonington Steamship Company, plaintiff, against The Greenwich Insurance Company, defendant. Answer. Butler, Stillman & Hubbard, defendant's attorneys, 111 Broadway, New York. To Wm. P. Dixon, Esq., pl'ffs att'y. Received Sept. 24, 1881. Wm. P. Dixon.

44

45 At a special term of the supreme court of the State of New York in and for the city and county of New York, held at the court-house in the city of New York on the 22nd day of November, 1881.

Present: Hon. Charles Donohue, justice.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

On reading and filing the annexed petition of the Greenwich Insurance Company, verified the 14th day of November, 1881, praying for the removal of this suit into the circuit court of the United States for the southern district of New York in pursuance of the laws of the United States relating to the removal of suits from

46 the State courts, and upon filing the bond with good and sufficient surety offered by said defendant according to the requirements of said laws:

On motion of Butler, Stillman & Hubbard, attorneys for the defendants, it is—

Ordered, That said bond with good and sufficient surety and said petition be accepted, and that said suit be removed into the circuit court of the United States for the southern district of New York in the second circuit, and that no further proceedings be had in this court.

Witness the honorable C. Donohue, one of the justices of said supreme court, and the seal thereof, the 21st day of November, 1881.

(Signed) CHARLES DONOHUE.

A copy.

[SEAL.] WM. A. BUTLER, *Clerk.*

Please take notice that the within is a copy of an order made herein and entered and filed in the office of the clerk of this

47 court on the 22 day of November, 1881.

N. Y., December 1st, 1881.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Def't's Att'ys.

To Wm. P. Dixon, Pl'ff's Att'y.

(Endorsed:) N. Y. supreme court, city and county of New York.

The Providence and Stonington Steamship Company against The Greenwich Insurance Company. Copy order removing cause to the United States circuit court, Rhode Island. Butler, Stillman & Hubbard, attorneys for defendant, 111 Broadway, N. Y. city. To Wm. P. Dixon, pl'ff's att'y. Received Dec. 1, 1881. Wm. P. Dixon.

48 United States Circuit Court, Southern District of New York.

PROVIDENCE AND STONINGTON STEAMSHIP COMPANY
against
THE GREENWICH INSURANCE COMPANY. } 387.

"RHODE ISLAND."

Consent is hereby given that Miller, Peckham and Dixon be substituted in my place and stead as attorneys for the complainants in the above-entitled action.

WILLIAM P. DIXON,
Complainant's Attorney.
MILLER, PECKHAM & DIXON.

At a stated term of the circuit court of the United States, southern district of New York, held at the court-rooms in the city of New York, on the 23rd day of January, 1882.

Present: Hon Samuel Blatchford, circuit judge.

On reading and filing the foregoing consent, ordered that Miller, Peckham and Dixon be and they are hereby substituted in place of William P. Dixon as attorneys for complainants in the above-entitled action.

(S'd) SAM'L BLATCHFORD, *J.*

49 (Endorsed:) U. S. circuit court. The Providence and Stonington Steamship Company against The Greenwich Insurance Company. Copy stipulation and order of substitution. Miller, Peckham & Dixon, attorneys for plaintiffs, No. 29 Wall street, N. Y. city. Service of within admitted January 24th, 1882. Butler, Stillman & Hubbard, attorneys for def't.

50 Circuit Court of the United States for the Southern District of New York.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
against
THE GREENWICH INSURANCE COMPANY, Defendant.

Please take notice that we are retained by and appear for the defendant above named in the above-entitled action, and you will accordingly enter our appearance for the said defendant.

N. Y., April 3d, 1882.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant.

To Joseph M. Deuel, clerk of the circuit court of the United States for the southern district of New York.

51 (Endorsed:) U. S. circuit court, southern district of New York. The Providence and Stonington Steamship Company against The Greenwich Insurance Company. Notice of appearance. Butler, Stillman & Hubbard, attorneys for defendant, 111 Broadway, New York city. Please take notice that the within is a copy of a notice of appearance this day duly filed with the clerk of this court. New York, April 3d, 1882. Butler, Stillman & Hubbard, attorneys for defendant. To Miller, Peckham & Dixon, attorneys for plaintiff.

52 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 21st day of May, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Nathaniel Shipman, judge.

THE PROVIDENCE & STONINGTON STEAMSHIP COMPANY

vs.

THE GREENWICH INSURANCE COMPANY.

On motion of Wheeler H. Peckham, Esq., of counsel for the plaintiff in the above-entitled action, ordered trial.

Jurors sworn: Robert Armstrong, Geo. M. Raynor, Bailey Hathaway, Jr., Isaac Elkers, Christopher Meyers, Wm. A. Fraser, Wm. D. Everitt, Chas. F. Griffin, John K. Lasher, Caleb B. Knevals, John J. Holly, John F. Pusske.

Counsel for the respective parties herein stipulate in open court to try the case upon an agreed statement of facts, which is submitted.

Mr. Peckham moves that the court direct the jury to find a verdict for the plaintiff for the sum of $11,338.18.

53 Wm. A. Butler, Esq., of counsel for the defendant, moves that the court direct the jury to find a verdict for the defendant.

The court directs the jury to find a verdict for the plaintiff for the sum of $11,338.18.

The jury say that by direction of the court they find a verdict for the plaintiff for the sum of eleven thousand three hundred and thirty-eight dollars and eighteen cents, and so say they all.

Prior to the rendering and recording of the verdict Mr. Butler excepts to the ruling of the court in directing the jury to find a verdict for the plaintiff for $11,338.18.

On motion of Mr. Butler, ordered that the defendant have a stay of proceedings on said verdict for twenty day- from date within which to prepare and serve a bill of exceptions herein.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

Stay has never expired. N. Y., July 21, 1883. Butler, Stillman & Hubbard, def'ts att'y.

54 *Judgment. July,* 1883.

Circuit Court of the United States, Southern District of New York.

PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Plaintiff,
vs.
THE GREENWICH INSURANCE COMPANY.

This action having been brought in the supreme court of the State of New York, and the defendant having appeared and answered therein, and filed its petition for the removal of this suit from said State court into this court, and — bond, with good and sufficient surety, and said supreme court having, by its order duly made and entered on the 22d day of November, 1881, accepted said bond and petition, and directed that said suit be removed into this court, and said defendant having duly entered in this court a copy of the record in said suit and its appearance herein, and this cause being at issue and regularly placed upon the calendar of this court and regularly noticed for trial by both parties, and the issues having been
55 tried before the Hon. Nathaniel Shipman, circuit judge, and a jury, at a stated term of said circuit court held at the United States court-house, in the city of New York, on the 21st day of May, 1883, and the jury having, by direction of the court, rendered a verdict in favor of the plaintiff for the sum of eleven thousand three hundred and thirty-eight $\frac{18}{100}$ dollars, and plaintiff's costs having been duly taxed and adjusted, on notice, at the sum of one hundred and fifty-three & $\frac{02}{100}$ dollars:

Now, on motion of Miller, Peckham & Dixon, attorneys for the plaintiff, it is—

Considered and adjudged that the plaintiff, The Providence and Stonington Steamship Company, recover of the defendant, The Greenwich Fire Insurance Company, the sum — eleven thousand four hundred and ninety-one & $\frac{20}{100}$ dollars, and that plaintiff have execution therefor.

Judgment signed this 21st day of July, 1883.

JOHN A. SHIELDS,
Deputy Clerk.

56 Endorsed: U. S. circuit court. Providence & Stonington Steamship Company *vs.* Greenwich Insurance Company. Judgment-roll. Miller, Peckham & Dixon, att'ys for pl'ff, 29 Wall street, N. Y. Claim & int., costs, &c., $11,338.18.

57 *Bill of Exceptions.*

Circuit Court of the United States for the Southern District of New York.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY
vs.
THE GREENWICH INSURANCE COMPANY.

And now, on this day, to wit, the 21st day of May, 1883, before

the Hon. Nathaniel Shipam, at a circuit court held at the city of New York, came as well the said defendant and its attorneys and counsel as the said plaintiff and its attorneys and counsel, and the jurors being called likewise come, and, after being elected, tried, and sworn to try, the issues joined in this action, the plaintiff to maintain and prove the issues on its part, read in evidence a certain policy of insurance made and issued by the defendant to the plaintiff, which was marked Exhibit No. 1, and was in the words and figures following, to wit:

58 Entered according to act of Congress in the year 1879 by W. C. Annan, in the office of the Librarian of Congress, at Washington. No. 2661.

Sum insured, $10,000. Rate, 2 per cent.

By this policy of insurance The Greenwich Insurance Company of New York, in consideration of the sum of two hundred dollars do insure the Providence & Stonington Steamship Co., for account of whom it may concern, loss, if any, payable to them, or their order, the sum of ten thousand dollars on the steamer "Rhode Island," her hull, engines, boilers, machinery, tackel, apparel, furniture, and equipment, (or whatever steamer may be employed upon the line in the place of said steamer "Rhode Island" by said Providence & Stonington Steamship Co.,) said vessel to be employed between New York & Providence, or intermediate places, as a freight and passenger boat, with privilege of towing and assisting other vessels in distress, and being towed in all situations,
59 and with privilege for mechanics to work on board at any time, for the term of six months from the fifth day of April, 1880, at noon, until the fifth day of October, 1880, at noon, said steamer, or her substitute, for the purpose of this insurance, except on estimating for general average or salvage contribution, being valued at sixty-five thousand dollars.

It is understood and agreed that this policy is to indemnify the owners for all and any damages which shall arise from perils of the sea, and such general average charges and expenditures as may be assessed to the vessel, but this company is not to be liable in any event for a greater amount than the sum hereby insured. It is further understood and agreed that this company is not to be liable for any loss or damage occasioned by fire, or for any damage to the engine, boilers, or machinery, unless caused by stress of weather, stranding, sinking, or collision.

Premium, $200. Policy, $10,000.

It is further understood and agreed that the said Providence
60 and Stonington Steamship Co. may substitute in the place of said steamer "Rhode Island" some other suitable steamer, which shall be approved by this company, to run on said line in place of said steamer "Rhode Island," or her substitute, and this policy shall attach to such steamer while running, her hull, engines, boilers, machinery, tackle, apparel, furniture, and equipment to the same effect as if this policy were originally and specifically written

upon the steamer so substituted, instead of upon said steamer "Rhode Island."

[On p. 59 on the side:] This policy to continue in force from the date of expiration until notice is given this company of its discontinuance, the assured to pay for such privilege *pro rata* for the time used.

Notice of such substitution to be given to this company in writing at the time it is made. In case this insurance co. rejects the steamer so substi-ted the assured may cancel this policy at *pro rata* rate.

It is also understood and agreed that no thirds are to be deducted in case of partial loss, and that no contribution under this policy shall be claimed for any damage not exceeding $500.

61 In case of loss under this policy payment shall be made within 30 days after proof of same.

In witness whereof the said insurance company have caused these presents to be signed by their president and attested by their secretary, in the city of New York, the fifth day of April, 1880.

S. C. HARRIOT, *President.*

Attested: M. A. STONE, *Secretary.*

(Endorsed:) No. 2661. The Greenwich Insurance Company of New York. The Providence and Stonington Steamship Co. Steamer "Rhode Island." $10,000, at 2 per cent., $200. W. C. Annan, No. 160 Fulton street, cor. Broadway, N. Y.

It was thereupon admitted by plaintiff's counsel that the said policy was as to the printed matter appearing thereon, a form prepared by W. C. Annan, agent of the plaintiff, for the purpose of procuring the insurance, and that the written portions of the

62 policy and the writing on the margin thereof were in the proper handwriting of said Annan.

It was thereupon admitted by defendant's counsel that the steamer "Rhode Island" named in the policy was lost by a peril of the sea by running ashore on Bonnett's Point, in Narragansett bay, November 6th, 1880, and thereby suffered damage beyond the amount of the insurance, and that plaintiff thereafter gave due notice and proof of the loss and interest. The amount of the insurance money and interest to the date of trial was thereupon proved to be the sum of $11,338.18.

Plaintiff's counsel then rested the case, and the defendant's counsel, to maintain and prove the issues on its part, produced and read in evidence a letter written on behalf of the plaintiff to and received by the defendant on the day it bore date, which was marked Exhibit No. 2, and was in the words and figures following, to wit:

63 Providence & Stonington Steamship Co., Treasurer's Office, 177 West street, cor. Warren. C. S. Babcock, treasurer. P. O. box 3011.

NEW YORK, *Oct.* 9, 1880.

The Greenwich Ins. Co., New York.

GENTS: Herewith please find our check for sixty-six $\frac{67}{100}$ dolls., be-

ing one monthly premium, from Oct. 5 to Nov. 5, '80, on insurance on strs. Massachusetts & Rhode Island, as specified in your policies Nos. 2661 & 2662.

Yours resp'y, C. G. BABCOCK, *Treas.*

Plaintiff's counsel thereupon admitted that the said letter so read in evidence by the defendants was accompanied by the check of the plaintiff therein referred to for $66.66, and that no other or further notice was given by the plaintiff, or any one on its behalf, to the defendant before the happening of the loss.

Defendant's counsel then rested the case; and, the evidence being closed, the defendant's counsel thereupon insisted, as matter
64 of law, and prayed the court then and there to rule and decide as follows:

First. That the privilege written on the margin of the policy was wholly for the benefit of the assured, and gave them the option of continuing the policy and the risk written, thereby in force after the date of expiration named in the policy without doing any act or thing; that the only notice or act on the part of the assured called for by the privilege was notice of the time of discontinuance whenever the assured should elect to give such notice, and make payment thereupon for the time used under the privilege, at the rate of premium mentioned in the policy.

Second. That in the absence of any act or notice on the part of the assured determining the time when the policy should be discontinued, or making definite the time during which it should continue after the date of the expiration named in the policy, the policy and the risk continued from day to day under the terms of the privilege.

65 Third. That it was competetent for plaintiff to make the time which was left undefinite and uncertain by the terms of the privilege definite and certain, and to fix the time to be used under the privilege by proper notice or act for that purpose.

Fourth. That the voluntary act of the defendant on October 9th, 1880, after date of expiration in the policy had passed, and the policy was in force under the privilege only, in paying one month's premium at the *pro rata* rate mentioned in the policy and in specifying the period of one month, beginning October 5th, 1880, and ending November 5th, 1880, as the time for which payment was made and the acceptance of such premium by the defendants, were in law an election on the part of the plaintiff to continue the risk in force for one month, beginning October 5th, 1880, and terminating November 5th, 1880, and that the legal effect of the transaction was that the policy was thereby continued in force until No-
66 vember 5th, 1880, at noon and no longer, and that defendant's counsel thereupon prayed the court to direct the jury to find a verdict for the defendant.

Thereupon, after consideration, the court refused said request and each of them. Whereupon defendant's counsel then and there duly excepted to such refusals and excepted separately to each separate refusal of the court to rule and decide as requested in each separate

request, as above stated and numbered, and separately excepted to the refusal of the court to direct a verdict for the defendant; and said several exceptions were thereupon duly noted by the court.

The plaintiff's counsel then requested the court to direct a verdict for the plaintiff for the amount of the insurance moneys, with interest, as proved, and the court thereupon directed the jury to find a verdict for the plaintiff for the sum of $11,338.18, being the amount of said insurance moneys, with interest. The court granted such request and rendered its decision and opinion upon the re-
67 spective motions of the parties, as follows:

Opinion.

SHIPMAN, Judge:

The defendant insured the plaintiff against loss or damage by perils of the sea to the steamer Rhode Island for the term of six months from April 5, 1880, in the sum of $2,500, by written policy of insurance; its written memorandum or provision made upon the margin of the policy was in the words:

"This policy is to continue in force from the date of expiration until notice is given to this company of its discontinuance, the assured to pay for such privilege *pro rata* rate for the time used."

On October 9th, 1880, the plaintiff, by letter, informed the defendant that it enclosed a check for $66.67, and that the check was in payment of a month's insurance on said steamer, and on another steamer, viz., from Oct. 5th, to Nov. 5th. The check was inclosed in the letter, and was paid. No other communication in regard to insurance of said vessels took place, and the Rhode Island
68 was injured by the perils insured against on Nov'r 6th, 1880, to the extent of $10,000.

1. The plaintiff claims that the amount of said policy is due by reason of the fact that no notice of discontinuance had been given to the defendant, and no discontinuance had in fact taken place. The defendant claims that by virtue of the foregoing facts the policy was discontinued on November 5, and notice thereof had been given by said letter to the defendants. The question turns entirely upon the legal effect of said policy, and of the said letter, and of the inferences to be drawn from the letter.

Each party admits that the contract of insurance continued until affirmative notice of discontinuance was given to the defendant.

The plaintiff claims that the letter and the conduct of the company in writing the letter and sending the check gave no notice of any intention to discontinue the policy.

The defendant insists that discontinuance may be notified
69 by the acts of the plaintiff, and that the letter virtually states, or that the fair inference from the letter was, that the contract was to end Nov'r 5th.

2. It seems to me that the letter simply stated the intention of the plaintiff to continue the contract at least until Nov'r 5th, but contained no statement that no further continuance was desired, and that no inference could be drawn that it did not desire further con-

tinuance. The plaintiff said: I want another month's insurance, but did not say that is all I want. I enclose payment for one month, but I do not intimate that no more payments are to be made.

It is true that the plaintiff could elect when to stop being insured, and that an election once made was final, but the defect in the defendant's case is that there is no evidence from the letter that an election to stop had been made. All the election which it shows was an election to continue for one month. It is not only a violent presumption to conclude that the plaintiff had determined
70 to stop, but, on the contrary, the question was left entirely open, and a continuing contract was still enjoyed.

It is true that no payment had been made after Nov'r 5, and none was required to be made until election to discontinue had been given, or until demand of payment was made. Neither could the defendant have fairly inferred, upon receipt of the letter, that the contract was not to continue after Nov'r 5. All that it said was: I pay you for another month; but I do not say, because I have not determined, that I am to stop at the end of the month. The object of the letter was prompt payment of accruing obligations.

To be sure the contract was rather one sided. It gave to the plaintiff alone the power of determining for how long a reasonable time it was to continue to have the benefits of the contract, but it was the contract which the defendant signed.

The motion of the plaintiff is granted. The motion of the
71 defendant is denied, and the jury are directed to find a verdict for the plaintiff for the sum of $11,338.18.

The defendant's counsel thereupon duly excepted to such ruling and decision of the court and to the direction of the court and to the direction to the jury to find the verdict as aforesaid for the plaintiff, which exception was then and there duly noted by the court. The jury thereupon, under the direction of the court, rendered a verdict in favor of the plaintiff for $11,338.18. And because none of said exceptions so taken and made to the rulings, decisions, and directions of said presiding judge appear upon the record of said trial, therefore, upon the prayer of said defendant, the same are hereby stated, settled, and allowed at the term at which said verdict was rendered.

Witness my hand and seal, this 17th day of July, 1883.

N. SHIPMAN, *Judge.* [L. S.]

72 (Endorsed:) U. S. circuit court, southern district of New York. The Providence and Stonington Steamship Company *vs.* The Greenwich Insurance Company. Bill of exceptions. Butler, Stillman & Hubbard, attorneys for defendant, 111 Broadway, N. Y. Due service of a copy of the within bill of exceptions hereby admitted. June 7, 1883. Miller, Peckham & Dixon, att'ys for pl'ff. U. S. circuit court. Filed Jul- 20, 1883. Timothy Griffith, clerk. The for- of the within bill of exceptions is hereby approved. New York, July 11th, 1883. Miller, Peckham & Dixon, att'ys for pl'ff.

73 *Stipulation.*

Circuit Court of the United States for the Southern District of New York.

PROVIDENCE AND STONINGTON STEAMSHIP COMPANY
against
THE STERLING INSURANCE COMPANY.

SAME *vs.* THE NASSAU FIRE INSURANCE COMPANY.

SAME *vs.* THE COMMERCIAL FIRE INSURANCE COMPANY.

SAME *vs.* THE BUFFALO INSURANCE COMPANY.

SAME *vs.* THE TRADESMEN'S FIRE INSURANCE COMPANY.

74 SAME *against* THE GREENWICH INSURANCE COMPANY.

The above-entitled actions having been commenced to recover insurance moneys claimed to be due and owing by the several insurance companies, defendants therein, under policies of insurance issued upon the steamer Rhode Island by said companies, respectively, and claimed to be in force on November 6th, 1880, when said steamer, by a peril of the sea, sustained damage beyond the amount of such insurance, and issue having been joined in all said actions, and the issue joined in the case of the above-named plaintiff against the Greenwich Insurance Company having been brought to
75 trial before the Hon. Nathaniel Shipman, at a circuit court held in and for the southern district of New York, May 21, 1883, and a verdict therein rendered in favor of the plaintiff for the sum of $11,338.18, being the amount claimed, with interest, by direction of the court, and judgment duly entered therein, and a writ of error being about to be taken to the Supreme Court of the United States by the defendant to review said judgment, it is now hereby stipulated and agreed that pending the prosecution, hearing, and determination of the said writ of error in said last-mentioned action, provided that the same is prosecuted to effect, proceedings shall be stayed in all of the other several actions above entitled, including the action against the Nassau Fire Insurance Company, in which a trial has been
76 had and judgment rendered in favor of the plaintiff against the defendant on the 1st day of June, 1883, for the sum of $2,887.95.

And in consideration of the premises, and as a condition of said stay of proceedings, each of said several defendant insurance companies shall, within ten days from the date hereof, make and file an undertaking or bond in the penalty of double the amount of the claim in each action, with interest to date of such bond or undertaking, in form hereto annexed.

Dated New York, July 25, 1883.

MILLER, PECKHAM & DIXON,
Att'ys for Pl'ffs.
BUTLER, STILLMAN & HUBBARD,
Attys for Def'ts.

77 *Bond.*

Circuit Court of the United States for the Southern District of New York.

PROVIDENCE AND STONINGTON STEAMSHIP COMPANY
vs.
THE GREENWICH INSURANCE COMPANY.

Know all men by the presents that we, The Greenwich Insurance Company, principals, and Samuel C. Harriot, of the city of New York, and Mason A. Stone, of the city of New York, sureties, are held and firmly bound unto The Providence and Stonington Steamship Company, the plaintiff above named, and its successors and assigns, in the penal sum of twenty-two thousand nine hundred and two dollars; for which sum, well and truly to be paid, we bind ourselves, our successors, and assigns, heirs and personal representatives, jointly and severally, firmly by the presents.

Sealed with our seals this 21 day of June, 1883.

78 Whereas in a certain action by the above-named plaintiff in this court against The Greenwich Insurance Company a judgment has been rendered in favor of said plaintiff against said last-named company on the 21st day of July, 1883, and a writ of error has been taken to the Supreme Court of the United States by the said Greenwich Insurance Company to review said judgment, and said plaintiff has consented to stay proceedings in the above-entitled action pending the prosecution, hearing, and determination of said writ of error, provided the same is prosecuted to effect upon condition that, in the event that said judgment shall be affirmed or said writ of error dismissed by said supreme court or abandoned by the plaintiff in error, plaintiff shall be entitled to enter judgment herein for the whole amount claimed in the complaint in the above-entitled action with interest thereon at the rate of six per cent. per annum and taxable costs, which sum shall thereupon be paid by the defendant herein and said payment secured by the giving of this obligation:

79 Now, the condition of this obligation is such that if the said Greenwich Insurance Company shall prosecute its said writ of error to effect, and if in case the judgment against said Greenwich Insurance Company shall be affirmed by the said Supreme Court, or the said writ of error of the said Greenwich Insurance Company dismissed or abandonded, the said The Greenwich Insurance Company above named shall well and truly pay unto the said Providence and Stonington Steamship Company, plaintiff herein, the whole amount claimed in the complaint in above-entitled action with interest thereon at the rate of six per cent. per

annum and the taxable costs in above said action, then this obligation shall be void; otherwise shall remain in full force and virtue.

THE GREENWICH INSURANCE COMPANY,
[L. S.] By S. C. HARRIOT, *Pres't.*
S. C. HARRIOT. [SEAL.]
M. A. STONE. [SEAL.]

In the presence of—
E. S. SIMPSON.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

80 Samuel C. Harriot and Mason A. Stone, the above-named sureties, being duly sworn, depose and say, each for himself, that he is a freeholder in the State of New York and resides in the city of New York, and that he is worth the sum of twenty-two thousand nine hundred and two dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

S. C. HARRIOT.
M. A. STONE.

Sworn to before me this 21 day of July, 1883.
[L. S.] C. S. SIMPSON.
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

On this 21 day of July, in the year 1883, before me, personally came Samuel C. Harriot, the president of the Greenwich Insurance Company, with whom I am personally acquainted, who being by me duly sworn, said that he resided in the city of New York, that he was the president of the Greenwich Insurance Company,
81 that he knew the corporate seal of said company, that the seal affixed to the foregoing instrument was such corporate seal, that it was affixed thereto by order of the board of directors of said company, and that he signed his name to the foregoing instrument by the like order as president of said company.

[L. S.] C. S. SIMPSON,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

On this 21 day of July, 1883, before me personally appeared Samuelle Harriot & Mason A. Stone, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and acknowledged to me that they executed the same.

[L. S.] C. S. SIMPSON,
Notary Public, N. Y. Co.

The foregoing bond is hereby approved as to form and sufficiency upon granting a supersedeas, upon writ of error to review
82 before the Supreme Court of the United States the judgment of the circuit court of the United States in the above-entitled action.

Dated N. Y., July 30th, 1883.

MILLER, PECKHAM & DIXON,
Att'ys for Pl'ff.

Bond approved and supersedeas ordered.
August 1, 1883.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

Endorsed: U. S. circuit court, southern district of New York. Providence & Stonington Steamship Company *vs.* The Sterling Insurance Company and five other actions against other insurance companies. Original. Stipulation and bond to stay proceedings. U. S. circuit court. Filed Aug. 7, 1883. Timothy Griffith, clerk.

83 United States of America to the Providence and Stonington Steamship Company: Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Greenwich Insurance Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, one of the
84 justices of the said Supreme Court of the United States, this sixth day of August, in the year of our Lord one thousand eight hundred and eighty-three.

SAM'L BLATCHFORD,
One of the Justices of the Supreme Court of the United States.

85 [Endorsed:] U. S. Circuit court, southern dist. N. Y. The Providence and Stonington Steamship Co. ag'st The Greenwich Insurance Company. (Original.) Citation. Butler, Stillman & Hubbard, defendant's attorneys, 111 Broadway, N. Y. Due personal service of a copy of the within citation on the defendant in error is hereby admitted. N. Y., August 7th, 1883. Miller, Peckham & Dixon, att'ys for def't in error. U. S. circuit court. Filed Aug. 8, 1883. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 267. The Greenwich Insurance Company, pl'ff in error, *vs.* The Providence and Stonington Steamship Company. Filed 28th August, 1883.

119/481

Office Supreme Court U. S.
FILED
APR 1 1886
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1885.

No. 267.

THE GREENWICH INSURANCE COMPANY,

Plaintiff in Error,

against

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

BUTLER, STILLMAN & HUBBARD,

Attorneys for Plaintiff in Error.

WILLIAM ALLEN BUTLER,

Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885. No. 267

THE GREENWICH INSURANCE COMPANY,
Plaintiff in Error,

AGAINST

THE PROVIDENCE and STONINGTON
STEAMSHIP COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This cause comes up by writ of error to the Circuit Court of the United States for the Southern District of New York, to review a judgment entered in favor of the plaintiff below, upon a verdict directed by the Court at the trial, for the sum of $11,491.70.

See judgment rendered July 21, 1883, Rec., p. 19.

The action was originally commenced in the Supreme Court of the State of New York, and was removed to the United States Circuit Court for the Southern District of New York (*Rec. pp.* 2–19).

THE COMPLAINT averred that the plaintiff, the Providence and Stonington Steamship Company, a corporation existing under the laws of Rhode Island, was the owner of the steamer "Rhode Island," and that on April 5, 1880, the defendant, the Greenwich Insurance Company, a New York corporation, made and delivered to the plaintiff its policy of insurance, whereby defendant insured

the said steamer "Rhode Island" in the sum of $10,000 for the term of six months from April 5, 1880, against perils of the sea.

That by agreement endorsed on the policy it was to continue in force from the date of expiration thereof until notice should be given the defendant of the discontinuance thereof, the plaintiff to pay for such privilege a *pro rata* rate of premium for the time used, which premium this plaintiff is ready and willing to pay.

That on the night of November 6, 1880, the policy and privilege being still in force and no notice of discontinuance having been given by plaintiff to defendant, the steamer "Rhode Island" was stranded and wrecked by a peril of the sea and sustained damages in excess of $57,000, the total amount of insurance on the vessel.

The complaint then avers notice and proof of loss, and demand of payment, &c., and demands judgment for $10,000 with interest from February 28, 1881, and costs.

Complaint, Rec., pp. 13, 14.

THE ANSWER denies that the terms and conditions of the policy are correctly stated in the complaint and refers to the original policy and sets up as an affirmative defense that on October 4, 1880, the defendant duly notified plaintiff that the defendant would not renew or continue the policy beyond October 5, 1880, and that subsequently plaintiff agreed that said policy of insurance should be discontinued and expire on November 5, 1880, at noon, and demands judgment that the complaint be dismissed with costs.

Answer, Rec., pp. 14, 15.

At the trial at the Circuit Court, before Hon. NATHANIEL SHIPMAN, May 21, 1883, there was no dispute as to the facts. They were as follows:

The policy of the Greenwich Insurance Company on the steamer "Rhode Island," issued April 5, 1880, in the sum of $10,000, was for the term of six months from April 5, 1880, at noon, until October 5, 1880, at noon. It insured against marine risks, and it provided that it was to cover any substituted steamer approved by the insurance company.

The policy was written on a printed form, which had been prepared by W. C. Annan, agent, not for the insurance company, but for the plaintiff steamship company, and the written portions of the policy and the writing on the margin were in Annan's handwriting. On the margin of the policy was the following writing.

"*This policy to continue in force from the date of expiration until "notice is given this company of its discontinuance, the assured to pay "for such privilege pro rata for the time used.*"

Policy, Rec., pp. 20, 21, *fol.* 60.

On October 9, 1880, the Treasurer of the Providence and Stonington Steamship Company wrote to the Greenwich Insurance Company a letter as follows:

"NEW YORK, Oct. 9, 1880.

"THE GREENWICH INS. CO., NEW YORK:

"GENTS—Herewith please find our check for sixty-six $\frac{67}{100}$ dolls., "being one monthly premium from Oct. 5th to Nov. 5th, '80, on ins. "on Strs. 'Massachusetts' and 'Rhode Island,' as specified in "your policies Nos. 2661 and 2662.

"Yours respy.,

"C. G. BABCOCK,

"*Treas.*"

The letter contained the check referred to therein for $66.67. No other payment was made or tendered, and no other or further notice was given, or act or thing done, by or on behalf of the Steamship Company, the assured under the policy, up to the time of the loss.

After the expiration of the month terminating November 5, 1880, and on November 7, 1880, the "Rhode Island" was lost by running ashore on Bennett's Point in Narragansett Bay, and suffered loss beyond the amount of her total insurance.

The assured gave notice and made proofs of loss, and the Insurance Company refused to pay, on the ground that the policy was not in force at the time of the loss, nor after November 5, 1880, at noon.

Thereupon suit was brought.

On the above state of facts, there being no conflict of evidence, the defendant's counsel asked the Court to rule and decide, as matter of law, that under the terms of the policy and of the privilege written on the margin thereof, and the voluntary act of the assured in electing, after the expiration of the policy, to renew it and continue it in force for one month from October 5, 1880, to November 5, 1880, the

policy was in force only to November 5, 1880, at noon, and was not in force at the time of the loss.

The Court refused so to rule, and the defendant's counsel duly excepted.

Requests, Rulings and Exceptions Rec., pp. 22, 23.

The Court, at the request of plaintiff's counsel, then directed a verdict for the amount claimed, $11,338.18, to which the defendant's counsel duly excepted.

Decision and Exception, Rec., p. 24.

Judgment was entered on the verdict and a bill of exceptions duly made and signed.

Rec., p. 24.

By stipulation in five other actions brought by the same assured against other insurance companies having similar policies on the "Rhode Island" with like conditions and provisions and in which the same question substantially is at issue as in the case at bar, all proceedings in such actions have been stayed until the determination of the writ of error herein. The aggregate amount involved in the present hearing is therefore $57,000, exclusive of interest.

Stipulation, Rec., p. 25.
Complaint, p. 3, *fol.* 8.

Assignment of Errors.

The plaintiff in error assigns as error the following:

1. The Court below in refusing to rule and decide as prayed by defendant's counsel at folio 64, page 22 of the Record, that the privilege written on the margin of the policy was wholly for the benefit of the assured and gave them the option of continuing the policy in force after the date of expiration named in the policy, without doing any act or thing; that the only notice or act on the part of the assured called for by the privilege was notice of the time of discontinuance whenever the assured should elect to give such notice and make payment thereupon for the time used under the privilege, at the rate of premium mentioned in the policy.

2. The Court below erred in refusing to rule and decide as further prayed by defendant's counsel at folio 64, page 22 of the Record,

that in the absence of any act or notice on the part of the assured, determining the time when the policy should be discontinued or making definite the time during which it should continue after the date of the expiration named in the policy, the risk continued from day to day under the terms of the privilege.

3. The Court below erred in refusing to rule and decide as further prayed by defendant's counsel at folio 65, page 22 of the Record, that it was competent for the plaintiff to make the time which was left indefinite and uncertain by the terms of the privilege, definite and certain and to fix the time to be used under the privilege by proper notice or acts for that purpose.

4. The Court below erred in refusing to rule and decide as further prayed by defendant's counsel at folio 65, page 22, of the Record, that the voluntary act of the plaintiff on October 9, 1880, in paying one month's premium at the *pro rata* rate, and specifying one month, beginning October 5, 1880, and ending November 5, 1880, as the term for which such payment was made, was in law an election on the part of plaintiff to continue the risk for one month, and that the legal effect of the transaction was that the policy was thereby continued in force until November 5, 1880, at noon, and no longer.

5. The Court below erred in refusing to direct a verdict for the defendant.

6. The Court below erred in ruling and deciding as matter of law that the policy was in force at the time of the loss.

7. The Court below erred in granting the motion of plaintiff's counsel for a direction of a verdict for the plaintiff, and in directing such verdict.

POINTS.

First Point. The special form of the policy was devised by the Steamship Company, the assured, and was made the subject of a copyright by their agent, Mr. W. C. Annan, (*Rec., p.* 20, *fol.* 58). The " privilege " written on the margin originated with the same agent (*Id., p.* 21, *fol.* 62). The policy and privilege are to be construed in the light of these facts and of the plain intent of the assured, thus shown, to secure an insurance on their own terms and in

respect to which they should have the option and privilege of continuing the policy in force after the date fixed by its terms for its termination, without any payment or other act on their part, and until they should give notice of its discontinuance.

This, as the learned trial Judge says in his *nisi prius* opinion, was " rather one-sided " (*Rec., p.* 24, *fol.* 70).

It made the duration and termination of the risk (after the policy date of expiration had been passed) dependent wholly on the option of the assured until notice given by the assured to the insurance company. This was the " privilege." But the marginal writing provided further, that the assured was " to pay for such ' privilege ' *pro* " *rata*, for the time used " (*Rec., p.* 21, *fol.* 60).

The legal effect of the policy and the privilege was, therefore, that notwithstanding the expiration of the policy by its terms on October 5, 1880, it still continued in force, by virtue of the marginal writing, until such time as notice should be given by the assured of its discontinuance, and when so discontinued the assured were bound to pay for the time used under the privilege the *pro rata* rate of premium fixed by the policy.

Second Point. It is plain that the only notice from the assured to the insurance company called for by the " privilege," was a notice of discontinuance, to be given whenever the assured should see fit to discontinue the policy. In the absence of notice the policy continued in force. If the insurance company, for any reason, had desired to terminate the risk, it would have been necessary either to obtain the consent of the assured or, if legal reasons existed to entitle it to terminate the risk without such consent, some affirmative action would have been requisite. But the assured was not required to do anything in order to keep the policy in force. It ran on, under the privilege, after the policy date of expiration, precisely as before, and this would have been the case up to November 7, 1880, the date of the loss, had the assured chosen to abide by the " privilege " as they wrote it and as the insurance company accepted it.

There was no question of payment, because this was covered by the express terms of the " privilege." The assured were to pay for " the time used," language which can only mean that for such time as they chose to avail of under the " privilege," they were to pay.

This unusual and anomalous "privilege" was their own careful and deliberate stipulation, expressed in words chosen by themselves through their expert agent, and they are to be held to the compact as they made it.

Third Point. In this state of facts, the whole matter of the continuance or discontinuance of the policy being wholly in the hands of the assured and resting in their option as to the time to be used under the "priviiege," they deliberately, and by a new writing of their own, designated a definite period of time, viz., from October 5, to November 5, 1880, and paid what they called "one monthly premium" for that period.

This act was unquestionably under the "privilege," because the policy had expired by its terms on October 5, 1880, and the assured could treat it as unexpired only by virtue of the marginal writing.

What was the legal effect of the notice and payment? We submit that inasmuch as it was wholly uncalled for and unnecessary in order to keep the policy alive or to give validity or effect to the "privilege," its sole object and intent and its obvious meaning were to fix and make definite the indefinite time given by the "privilege."

The assured said in substance: We, the assured, having the privilege of continuing the policy in force indefinitely at our option, now exercise the option by fixing the time during which it shall continue in force at one month from October 5, 1880, to November 5, 1880, and for this as the "time to be used" under the "privilege," we now pay the *pro rata* stipulated sum.

On any other interpretration the writing of the letter of October 9, 1880, and the payment of the premium are inexplicable and senseless acts.

It is quite true that the assured did not say in express terms the policy is to be discontinued on November 5, 1880. And from this the learned Judge at the trial drew the inference that the notice and payment were not an election to stop the policy on November 5, 1880, but only to continue it to that date, leaving open the question when it should thereafter be discontinued. He says the object of the letter "was prompt payment of accruing obligations."

We submit that this was plain error. There was no "accruing

obligation" on the part of the plaintiff to pay anything or do anything except in connection with a discontinuance of the policy, and a simultaneous settlement for the "time used" under the privilege.

If there had been any obligation to pay monthly premiums, the act of the assured might justify the conclusion of the learned Judge. But there was no such obligation, and the suggestion as to "prompt payment" is wholly unsupported by the evidence. Indeed, it is contradicted by the evidence. If prompt payment of accruing obligations had been intended the assured would have paid the so-called "monthly premium" on or before October 5th, 1880, instead of waiting till the 9th, and then fixing a definite time for the running of the risk. There was no element of monthly insurance in the case.

The intent of the assured must be gathered from the facts as they were proved, and as it is indisputable that they were not to do anything if they wanted to keep the policy alive indefinitely, it follows that the act they did, if it has any significance, was an act under the privilege, intended to fix and make definite the time to be used, and to pay for such time.

In interpreting and giving effect to a contract, the court will look into the surrounding circumstances, and gather the intent of the parties from the facts which throw light on the transaction.

In *Reed vs. Insurance Company*, 95 U. S., 23, the case turned on the construction of the following clause in the policy: "The risk to "be suspended while vessel is at Baker's Island loading." and the question, as stated by the court in the opinion (p. 30), was, solely, whether the words meant "while the vessel is at Baker's "Island *for the purpose of loading*, or while at the Island *actually* "*loading*," and the clause was construed in the light of the situation of the contracting parties, the circumstances as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, to mean that the risk was suspended during all the time the vessel was at the Island, whether loading or not.

The rule is of stronger application where, in addition to the circumstances existing at the time of making the contract, the parties by their deliberate acts under and in pursuance of it furnish a guide for its interpretation.

Here there can be no question that the assured in making the contract intended to control the length of time to be used by them under the marginal privilege (dictated by themselves) at the rate of premium in the policy for the time to be used.

Nor can there be any question that their letter of October 9, 1880, was an act of the assured (1) under and in exercise of the privilege; (2) fixing a definite time to be used under the privilege, coupled (3) with the *pro rata* payment for such time to be so used.

Expunge the letter and check of October 9, 1880, from the record and the policy would have been in force on November 7, 1880, solely by reason of the non-action of the assured.

But the assured acted on the privilege and their letter and accompanying check are not nullities and cannot be expunged.

The simple question is whether the assured are to be held to their own acts.

Fourth Point. The law is settled that when an option or privilege exists the party entitled to it must be held strictly to its terms, and may by his acts determine it so as to conclude himself from claiming a benefit inconsistent with such acts.

Firemen's Ins. Co. vs. Lawrence, 14 John., 46.

The Court say: "It is a rule everywhere admitted that if a party has an election reserved to him in a contract, and he once fairly exercises that right of election, his determination is binding. It is most convenient in all manner of dealing that contracts uncertain at first should be reduced to certainty as soon as possible."

In *Brooklyn Oil Refinery vs. Brown*, 61 N. Y., 643. There was a seller's option to deliver 160,000 gallons of petroleum during month of May at rate of 40,000 gallons per week, through the month. It was held that the sellers had the whole month within which either to deliver the whole 160,000 gallons or, at their option, to make weekly deliveries, beginning with the first week, and having failed to make a delivery during the first week the conclusive presumption was that they had elected to make a single delivery of the whole at the close of the month.

In the case at bar the essence of the privilege or option was the indefinite time of running of the policy after the policy date of expiration. Anything which made that time definite by the act of the assured would exhaust the privilege.

The letter and payment of October 9, 1880, were voluntary acts of the assured which fixed a definite time, and made a payment for such time which was "time used" under the privilege and nothing else.

Suppose the letter had simply notified the insurance company that the insured intended under the privilege to use the time between October 5, 1880, and November 5, 1880, without accompanying the notice with a payment for such time, would they not then have clearly exercised the privilege by their election to use a specified and definite time, and having exercised it, exhausted it? They certainly could not play fast and loose with the privilege and with the option it gave. They could not determine the time to be used under it, and at the same time keep it alive. This, in homely phrase, would be "eating their cake and keeping it too." Common sense and a just rule of interpretation are against the claim that where a contract gives a privilege and option for a use of time to continue indefinitely so long as nothing is done, a positive act in exercise of the privilege and option fixing a definite time means nothing more than that the time specified was to be only a part of a longer indefinite period.

Again, could the Insurance Company, after accepting this notice and payment, have claimed that the policy was in force for an indefinite period after November 5, 1880, and demanded payment of further premiums?

The conclusive answer by the assured would have been that the indefinite time given them by the privilege had been made definite by their notice, and that the time they elected to use under the privilege had been paid for.

If this is so, the converse of the proposition must be admitted. The assured certainly cannot be allowed to exercise and use their privilege and option at their own volition and at the same time claim that they have not used it.

The use of the privilege and the payment for the time used fixed by their own voluntary act was at their own risk, and they must be held to the consequences of what they did.

Fifth Point. The judgment should be reversed and a new trial granted.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Plaintiff in Error.
WILLIAM ALLEN BUTLER,
Of Counsel.

[7807]

119/481

NOV 3 1886

Supreme Court of the United States.

OCTOBER TERM, 1886. No. 30.

THE GREENWICH INSURANCE COMPANY,
Plaintiff in Error,
against
THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY.

Supplemental Brief for Plaintiff in Error in reply to the Second Point filed by the Defendant in Error.

At the close of the proofs both the plaintiff and the defendant, by motions duly made, insisted that on the undisputed facts the case presented only a question of law to be determined by the Court by a direction of a verdict.

There were no disputed facts. Aside from the admitted facts of the loss of the *Rhode Island* and of the amount of damage, there was nothing in the case but the policy of insurance and plaintiff's letter (fol. 63).

The legal effect of that letter with reference to the policy was to be determined, and that was the only thing to be determined.

"As a rule the interpretation of written instruments is "with the Court as a question of law."

White vs. *Hoyt*, 73 N. Y., 512.

In *U. S.* v. *Hodge*, 6 How., 279, the Court left to the jury the interpretation of a clause in a written instrument against the request of the U. S. Attorney that the clause be interpreted by the Court. Held error, this Court saying that it was the duty of the trial Court "to con- "strue all written instruments given in evidence as a "question of law" (p. 282).

In *Goddard* v. *Foster*, 17 Wall, 123, the Court say (p. 142) it "is well settled law that written instruments are "always to be construed by the Court except when they "contain technical words or terms of art, or when the "instrument is introduced collaterally, and where its "effect depends, not merely on the construction and "meaning of the instrument, but upon extrinsic facts "and circumstances."

It is only when the meaning of the writing is obscure, or when the writings are to be interpreted in the light of facts testified to *aliunde*, that their construction or interpretation is to be left to the jury.

First National Bank vs. *Dana*, 79 N. Y., 116.

There was no ambiguity in the letter. There was no conflicting testimony in the light of which the writings were to be construed.

It was not a question of what the letter meant. The letter stated clearly its meaning, which was to pay one month's premium upon the policy.

What was the effect of the payment as made? Did it or did it not exhaust the privileges which the marginal clause reserved to the plaintiff? That was purely a question of law.

The question was treated by the Court and by the counsel solely as a question of law.

The defendant's counsel made his motion for a verdict

" as matter of law " (fol. 64), and insisted that the " legal effect " of the letter was to discontinue the policy (fol. 65).

And the trial judge held that " the question turned " entirely upon the *legal effect* of the policy, and of the " said letter and of the inferences to be drawn from the " letter " (fol. 68).

Our claim is that the writings constituting the sole evidence in the case, with all the inferences which could justifiably be drawn from them, were insufficient to support a verdict for the plaintiff, because upon them it could not legally be held that the policy was in force at the time of the loss. If we are right in this, it was the duty of the Court to direct a verdict in favor of defendants; certainly, if the Court direct a verdict for the plaintiff in this state of the case, against defendant's exception, it is error.

Schofield v. *R. R. Co.*, 114 U. S., 615.

The counsel for defendant in error cannot raise the point, because he claimed at the trial by his motion for a direction of verdict that there was nothing for the jury. If he had claimed that there was any question of fact, the defendant below could have raised the identical point now here by asking the Court to charge the jury that the legal effect of the letter was to terminate the policy on November 5, 1880, and the refusal so to charge would have been ground for exception and writ of error. Or if the counsel had then claimed, as he does now, that any question of fact was left to the Court, a finding could have been made and excepted to. But both parties and the Court properly treated the case as raising only a pure question of law to be disposed of by a direction of a verdict.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Plaintiff in Error.

WILLIAM ALLEN BUTLER,
Of Counsel.

119/481

EVENING POST JOB PRINTING OFFICE—N. Y.

U. S. Supreme Court.

THE GREENWICH INS. CO.,
Plaintiff in Error,

AGAINST

THE PROVIDENCE AND STONINGTON STEAMSHIP CO.,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement.

Plaintiff in error, by a policy of insurance, insured the steamer *Rhode Island* for six months from April 5, 1880, to October 5, 1880, at noon.

On the side of the policy were written the following words: "This policy to continue in force from the date of expiration until notice is given this company of its discontinuance, the assured to pay for such privilege *pro rata* for the time used."

On October 9, 1880, defendant in error wrote to plaintiff in error the following letter :

"Providence and Stonington Steamship Co., Treasurer's Office, 177 West street, corner Warren, C. G. Babcock, Treasurer, P. O. Box 3011.

"NEW YORK, October 9, 1880.

"THE GREENWICH INS. CO., NEW YORK:

"GENTS—Herewith please find our check for sixty-six $\frac{67}{100}$ dolls., being one monthly premium from October 5 to to Nov. 5, '80, on insurance on strs. *Massachusetts* and *Rhode Island*, as specified in your policies Nos. 2661 and 2662.

"Yours Respy.,

"C. G. BABCOCK, Treas."

The letter was accompanied by a check for $66.67.

There was no other communication between the parties previous to the loss.

The steamer was lost November 6, 1880.

The whole evidence in the case is on pages 20, 21 and 22 of the record.

The only question in the case is whether the policy was in existence on the 6th November or had expired on the 5th November.

The Court below held that the policy was in existence and directed a verdict for defendant in error, plaintiff below.

Plaintiff in error, defendant below, excepted.

POINTS.

First.—On the policy itself there can be no question but that it was in force at the time of the loss. By its terms it remained in force *until notice* of its discontinuance was given to the company.

Unless, therefore, a notice of that kind is shown, the policy remained in force.

In determining whether such notice has been given the use of the word "privilege" is without legal signification. The word as used really means term or time.

The purpose is to show that the premium of two hundred dollars mentioned in the policy did not cover the time which might be used beyond the six months.

Being insured beyond the six months was of course no more a "privilege" than the being insured during the six months. The insurance for the further term was exactly like the insurance for the six months—a *contract* for a valuable consideration. In no proper sense of the word was it a privilege.

The meaning is plain enough, though the draughtsman was not happy in his selection of a word.

Now the letter and accompanying check in no sense gave the required notice of discontinuance of the policy. The letter described the check as being for one monthly premium. It simply paid up for one month.

The use in the letter of the term "one monthly premium," plainly indicates that there would or might be more.

Webster defines "monthly" as "once a month"—"in every month."

The words "one monthly premium," therefore, not only *do not* support the contention that the letter was a notice of the discontinuance of the policy, but they present an absolute bar to such contention.

Terminating the existence of a policy of insurance is an act of importance.

It should and naturally would be done if intended, clearly, definitely and with precision.

It should not and naturally would not be left to indefinite inference.

We submit that the Court is not at liberty to spell out a discontinuance by fanciful imputations that the defendant in error meant or intended other than simply what it said.

Second.—If there could be any claim that the letter and check were a "notice of discontinuance of the policy," it could be made only as a question of fact and not as a question of law.

It was not *in terms* a notice of discontinuance.

If it were claimed that it amounted to such—that it was so intended by the S. S. Company, and was so understood by the insurance company—that would be question of fact for the jury.

Now, there was no request to submit any such question to the jury, and consequently no such question is raised in the record.

The bald claim is made that the Court should hold as a question of law that the letter and check were a "notice of discontinuance of the policy," and that in refusing so to hold as matter of law, the Court erred.

We submit that there was no error in so refusing.

At the very best it was a question of intent—of construction of acts—of inferences to be drawn from acts.

Such questions are always for the jury, and there was no error in refusing to decide them as questions of law.

McGrath *vs.* R. R. Co., 32 Barb., 147.
Ernst *vs.* R. R. Co., 35 N. Y., 25.
Pleasants *vs.* Fane, 22 Wallace, 121.
4th Law Rep. Exch., 33; 2 Law Rep., Privy Council Appeals, 335.
Imp. Co. *vs.* Munson, 14 Wallace, 448.

If it be said that the Court granted our motion for a direction, the answer is that an exception to such direction does not raise the question whether the case ought not to have been submitted to a jury.

To raise that question there must have been a request so to submit.

Leaving it to the Court to decide the motion for a direction which involved a question of fact leaves the decision of the Court on such question of fact to stand

the same as the verdict of a jury, and it cannot be reviewed in this Court.

Winchell *vs.* Hicks, 18 N. Y., 558.
O'Neill *vs.* James, 43 N. Y., 85.
Todd *vs.* Todd, 3 Hun, 298.
Ormes *vs.* Dauchy, 82 N. Y., 443.

Third.—Judgment should be affirmed with costs.

WHEELER H. PECKHAM,
Of Counsel for Defendant in Error.

[K 2083]